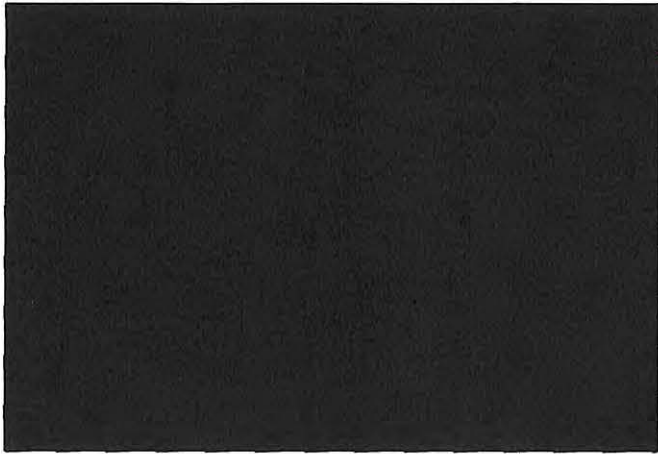


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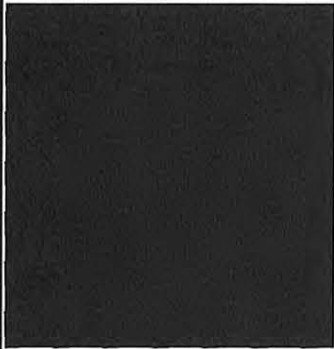
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FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



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(U) GOVERNMENT'S RESPONSE TO THE COURT'S
BRIEFING ORDER OF SEPTEMBER 16, 2015

~~(S//OC/NF)~~ The United States respectfully submits this response to the Briefing Order of the Foreign Intelligence Surveillance Court ("FISC" or "Court") issued on September 16, 2015, in the above-captioned docket numbers. Specifically, this response addresses whether the following two aspects of the minimization procedures submitted with DNI/AG 702(g) Certifications  (hereinafter the "2015 Reauthorization Certifications") meet the definitions of minimization procedures in sections 101(h) and 301(4) of the Foreign Intelligence Surveillance Act ("FISA" or "the

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Act”), 50 U.S.C. §§ 1801(h) and 1821(4), and are consistent with the Fourth Amendment to the Constitution: (1) “queries of information obtained under section 702, particularly insofar as queries may be designed to return information concerning United States persons,” and (2) “preservation for litigation purposes of information otherwise required to be destroyed under the minimization procedures.” *See In Re DNI/AG 702(g)*

[REDACTED]

[REDACTED] Briefing

Order at 3 (FISA Ct. Sept. 16, 2015). For the reasons discussed in detail below, the government respectfully submits that both of these aspects of the minimization procedures meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) and 1821(4) and are consistent with the Fourth Amendment to the Constitution of the United States.

I. (U//FOUO) The Provisions of the Proposed Minimization Procedures Regarding Queries Designed to Return Information, Including Concerning United States Persons, Obtained Under Section 702 Are Consistent With the Act and the Fourth Amendment

~~(S//OC/NF)~~ Communications acquired pursuant to section 702 of the Act, 50 U.S.C. § 1881a, are subject to both targeting procedures and minimization procedures intended to ensure that agencies target non-United States persons reasonably believed to be located outside the United States who are assessed to communicate or possess foreign intelligence information. Once these communications are acquired, authorized

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intelligence professionals at the National Security Agency (“NSA”), Federal Bureau of Investigation (“FBI”), and Central Intelligence Agency (“CIA”) are permitted to review them in order to assess whether they may be retained or disseminated.¹ This review can be accomplished either on a communication-by-communication basis or by tailored querying of the acquired communications. Such queries promote both efficiency and privacy. By using queries, personnel can more quickly identify communications of interest – i.e., those that contain foreign intelligence information – while filtering out communications that may contain private information that are unlikely to contain the desired foreign intelligence information. Stated differently, tailored queries of section 702-acquired communications reasonably designed to return foreign intelligence information or, in the case of the FBI, evidence of a crime, regardless of whether such queries are designed to return United States person information, are simply a way for

¹(S) See, e.g., DNI/AG 702(g) [REDACTED], *Minimization Procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, Ex. B at 3-4, § 3(b)(1) (filed July 28, 2014) (“2014 NSA Minimization Procedures”) (recognizing that analysts may review communications, including those containing United States person information, that are “clearly not relevant to the authorized purpose of the acquisition”). As the Court is aware, NSA’s upstream Internet collection pursuant to section 702 can acquire multi-communication transactions (MCTs), which can include discrete communications that are not to, from, or about a tasked selector. For this reason, NSA’s minimization procedures provide additional access and handling restrictions for certain MCTs. Notably, however, United States person queries are not permitted to be conducted in NSA’s upstream Internet collection, *see* 2015 Reauthorization Certifications, Ex. B at 7, meaning that any United States person information in such MCTs will not be returned based on a query of NSA’s upstream Internet collection using United States person identifiers.

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intelligence professionals to more efficiently focus on particular communications from a larger set of lawfully acquired communications that they are already authorized to review under Court-approved minimization procedures. Tailored queries using United States person identifiers as selection terms further assist in ensuring that communications that contain United States person information are not unnecessarily or indiscriminately reviewed.

~~(TS//SI//OC/NF)~~ The current NSA and CIA minimization procedures applicable to information collected pursuant to section 702 permit tailored queries of such information using United States person identifiers as selection terms where there is a reasonable basis to expect the query to return foreign intelligence information. *See, e.g.,* 2014 NSA Minimization Procedures at 6-7; *DNI/AG 702(g)* [REDACTED] *Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended*, Ex. E at 3 (filed July 28, 2014) (“2014 CIA Minimization Procedures”). The current FBI minimization procedures applicable to section 702 information permit tailored queries using United States person identifiers where there is a reasonable basis to expect the query to return foreign intelligence information or evidence of a crime. *See, e.g., DNI/AG 702(g)* [REDACTED] *Minimization Procedures Used by the Federal Bureau of Investigation in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign*

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Intelligence Surveillance Act of 1978, As Amended, Ex. D at 11 (filed July 28, 2014) (“2014 FBI Minimization Procedures”). The 2014 NSA, FBI, and CIA minimization procedures were approved by the FISC as consistent with both the Act and the Fourth Amendment.

See *In Re DNI/AG 702 Certifications* [REDACTED]

[REDACTED] Memorandum

Opinion and Order (“2014 Mem. Op.”), at 41 (FISA Ct. Aug. 26, 2014).

~~(S//OC/NF)~~ In the proposed minimization procedures submitted to the Court with the 2015 Reauthorization Certifications, the government has made several changes to provisions of the NSA, FBI, and CIA minimization procedures regarding United States person queries. None of the changes to the 2015 procedures expand the agencies’ authorities; each of these changes incorporates existing practices or policy restrictions, or clarifies or enhances existing practices designed to ensure queries are limited to authorized and appropriate purposes. These changes were made in response to policy recommendations of the Privacy and Civil Liberties Oversight Board (“PCLOB”) concerning the government’s use of United States person identifiers to conduct tailored queries of section 702-acquired communications. The PCLOB did not find the government’s query practices inconsistent with the Act or the Fourth Amendment, but made several policy recommendations to ensure the proper balance of privacy and national security. See, e.g., PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* at 9, 137-139 (July 2, 2014)

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("PCLOB 702 Report").² As explained in the 2015 Reauthorization Certifications Cover Filing (which is incorporated herein by reference), and as discussed below, these changes clarify obligations that the current minimization procedures already impose, incorporate existing practices or policy restrictions into the procedures, or enhance protections. As such, the government believes that these enhancements to the query

² ~~(S//NF)~~ After conducting an in-depth review of the section 702 program, including evaluating whether the program complies with the statutory and constitutional requirements, the Board "recognize[d] the considerable value that the section 702 program provides in the government's efforts to combat terrorism and gather foreign intelligence." *Id.* at 134. The PCLOB concluded that, "at its core, the program is sound," PCLOB 702 Report at 134, and did not find that the use of United States person queries was inconsistent with the requirements of the Act or the Fourth Amendment. In doing so, however, the Board acknowledged that "certain aspects of the Section 702 program push the program close to the line of constitutional reasonableness," including "the use of queries to search for the communications of specific U.S. persons within the information that has been collected" *Id.* at 9. The PCLOB report accordingly included a number of policy recommendations related to United States person queries, and the government has addressed those recommendations in the proposed NSA, FBI, and CIA minimization procedures currently pending with the Court. *See* 2015 Reauthorization Certifications, *Government's Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications* at 7-9, 20 (filed July 15, 2015) ("2015 Reauthorization Certifications Cover Filing").

(U) Chairman Medine and Board Member Ward issued a separate statement regarding United States person queries, recommending that the section 702 minimization procedures require that (1) "Americans' communications . . . be purged of information that does not meet the statutory definition of foreign intelligence information relating to Americans" at the time that the results of a United States person query are generated; and (2) the Court approve each United States person identifier to be used to query data collected pursuant to section 702 prior to a query being conducted. PCLOB 702 Report at 151-152 (annex A). As discussed in a separate statement issued by Board Members Brand and Collins Cook, the Board as a whole rejected those suggestions as unworkable and potentially exacerbating civil liberty concerns. *Id.* at 161-165 (annex B).

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provisions further contribute to the reasonableness of those provisions and of the minimization procedures overall.

A. (U) The Proposed Query Provisions Are Consistent With the Act

1. (U) Background

~~(S//NF)~~ The government's querying, including with the use of United States person identifiers, of lawfully acquired section 702 collection to identify foreign intelligence information or, in the case of the FBI, evidence of a crime is entirely consistent with the requirements of the Act. Nothing in the Act or its legislative history prohibits the government from performing queries of FISA-acquired information using United States person identifiers; to the contrary, as explained below, the legislative history suggests that appropriate controls on retrieving data were a form of minimization contemplated by Congress. Minimization procedures, including those with similar query provisions to those in the procedures submitted with the 2015 Reauthorization Certification, have been previously approved by this Court. The modifications the government has now proposed, as described in more detail below, continue to place limitations on how and when queries using United States person identifiers can be performed, limitations that satisfy the statutory definition of minimization procedures.

~~(S//NF)~~ As an initial matter, section 702 acquisition is a focused collection that targets non-United States persons located outside the United States for the purpose of

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collecting foreign intelligence information. United States persons may not be targeted under this program, and, as the Court has previously acknowledged, “[i]t is reasonable to presume that most persons in communication with a non-U.S. person target located overseas are themselves likely to be non-U.S. persons located overseas.” *In re DNI/AG Certification* [REDACTED], Mem. Op. at 38 n.44 (FISA Ct. Sept. 4, 2008) (“2008-A Mem. Op.”). Moreover, the techniques used for section 702 collection do not constitute bulk collection. *See* 2014 Mem. Op. at 26 (“acquisitions are not conducted in a bulk or indiscriminate manner”); [REDACTED] Mem. Op. at 8; *see also* PCLOB 702 Report at 103 (noting that the section 702 program “consists entirely of targeting individual persons and acquiring communications associated with those persons,” and “does not operate by collecting communications in bulk”). Instead, section 702 acquisition is “effected through thousands of discrete targeting decisions for individual facilities.” 2014 Mem. Op. at 26. These facilities are tasked to acquire communications from telephony providers, by or with the assistance of the FBI from [REDACTED] (b)(1); (b)(3); (b)(7)(E), or through NSA’s upstream Internet collection.³ *See, e.g., In re DNI/AG 702(g)* [REDACTED] (b)(1); (b)(3); (b)(7)(E).

³ (S) “NSA’s acquisition of Internet communications through its upstream collection under Section 702 is accomplished by acquiring Internet ‘transactions,’ which may contain a single, discrete communication, or multiple discrete communications, including communications that are neither to, from, nor about targeted facilities.” *In Re DNI/AG 702 Certifications* [REDACTED]

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, Affidavit of Admiral Michael S. Rogers,
United States Navy, Director, National Security Agency, at 1-2 (filed July 15, 2015)
(describing means by which section 702 acquisition occurs).

(U) Although the purpose of section 702 acquisition is not to acquire United States person communications, there has always been a recognition that the incidental collection of such communications was an expected result of the acquisition. As Senator Chambliss specifically noted in supporting section 702's reauthorization, when Congress first passed section 702, "Congress also understood that this incidental collection would likely provide the crucial lead information necessary to thwart terrorists like the 9/11 hijackers who trained and launched their attacks from within the United States." 158 Cong. Rec. S8413 (daily ed. Dec. 27, 2012) (statement of Sen. Chambliss). The PCLOB reached a similar conclusion, noting that "[t]he incidental collection of communications between a U.S. person and a non-U.S. person located outside the United States, as well as communications of non-U.S. persons outside the United States that may contain information about U.S. persons, was clearly contemplated by Congress at the time of drafting" section 702. PCLOB 702 Report at 82-83. Moreover, the PCLOB noted that "one of the purposes of the program is to

Mem. Op. at 15 (FISA Ct. Oct. 3, 2011). As noted above, United States person queries are not permitted to be conducted in NSA's upstream Internet collection.

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discover communications between a target overseas and a person in the United States,” which can be particularly important in identifying and disrupting terrorist plots against the homeland. *Id.* at 114–115.

2. (U) Legal Analysis

~~(S//OC/NF)~~ Section 702 requires the adoption of minimization procedures that comply with the definitions of such procedures in Titles I and III of the Act. *See* 50 U.S.C. § 1881a(e)(1) (requiring the Attorney General to adopt minimization procedures that meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) or 1821(4), as appropriate). This Court has found that the 2014 NSA, FBI, and CIA Minimization Procedures “comport with the definition of minimization procedures at Section 1801(h).” *See* 2014 Mem. Op. at 26. The portions of subsections 1801(h) and 1821(4) applicable to queries using United States person identifiers are as follows:⁴

(1) specific procedures, which shall be adopted by the Attorney General that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition

⁴ (U) Subsections 1801(h)(4) and 1821(4)(D), which address surveillances or searches conducted pursuant to other parts of the Act, respectively, are not at issue with respect to United States person queries of section 702-acquired information. While perhaps not directly at issue, subsections 1801(h)(2) and 1821(4)(B), which require that each agency’s minimization procedures restrict the dissemination of certain United States person information, would preclude the dissemination of United States person query results which did not constitute foreign intelligence information as defined by subsection 1801(e)(1) unless it was first determined that such information was necessary to understand foreign intelligence information or assess its importance, thus providing an additional layer of protection with respect to United States person information obtained from such queries.

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and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

* * *

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

50 U.S.C. § 1801(h)(1) & (3) (bracketed text from 1821(4)(A)). The United States person query provisions in the current and proposed NSA, FBI, and CIA section 702 minimization procedures meet the definition of minimization procedures, as specified in both of the above subsections.

~~(S//NF)~~ In particular, the United States person query provisions “are reasonably designed in light of the purpose and technique” of section 702 acquisition “to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.”

50 U.S.C. §§ 1801(h)(1), 1821(4)(A). As described above, both the purpose (targeting non-United States persons located outside the United States to acquire foreign intelligence information) and the technique (tasking specific, individual selectors at telephony and Internet providers to acquire communications to, from, or about those tasked selectors) are designed to limit the acquisition of non-publicly available

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information concerning United States persons that would not be foreign intelligence information. See [REDACTED] Mem. Op. at 23 (“The targeting of communications pursuant to Section 702 is designed in a manner that diminishes the likelihood that U.S. person information will be obtained”).

(U) In light of this purpose and technique of the section 702 acquisition, the government respectfully submits that the restrictions placed on the retrieval of incidentally acquired United States person information by the NSA, FBI, and CIA, and the oversight requirements imposed on those restrictions, are reasonably designed to properly ensure the minimization of “nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.” 50 U.S.C. §§ 1801(h)(1), 1821(4)(A). In particular, FISA’s legislative history suggests that Congress recognized that “provisions with respect to . . . what [information] may be retrieved and on what basis” can be one of the “means and techniques which the minimization procedures may require to achieve the purpose set out in the definition.” H.R. Rep. No. 95-1283, pt. 1, at 56 (1978). The provisions at issue here restrict queries using United States person identifiers, permitting such queries only if there is a reasonable basis to expect the query is likely to return foreign intelligence information or, in case of the FBI, evidence of a crime. Queries for purposes other than identifying foreign intelligence

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information or evidence of a crime -- for example for political, personal, or financial interests -- are prohibited.

(U) A tailored query conducted under a reasonable expectation that it would be likely to return foreign intelligence information plainly would be “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.” 50 U.S.C. §§ 1801(h)(1), 1821(4)(A). Specifically, the ability to use specific query terms to more efficiently and effectively identify foreign intelligence information contained in section 702-acquired information – including, for instance, to learn about the activities of a United States person terrorist suspect, to help identify a United States person in contact with a foreign intelligence officer, or to search for communications concerning a United States person who is the planned victim of an assassination or kidnapping plot – is a critical tool to ensure that the United States can timely “obtain, produce, and disseminate foreign intelligence information.” *Id.* The requirement that query selection terms be reasonably likely to return foreign intelligence information minimizes the likelihood that information unrelated to those foreign intelligence needs would be returned.

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~~(S//NF)~~ Likewise, a query by the FBI that is reasonably expected to return evidence of a crime⁵ is also consistent with a statutory scheme that expressly contemplates the retention and dissemination of non-foreign intelligence information that is evidence of a crime. *See* 50 U.S.C. § 1801(h)(3); *see generally In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (noting that Title I minimization procedures allow “the retention and dissemination of non-foreign intelligence information which is evidence of ordinary crimes for preventive or prosecutorial purposes”); H.R. Rep. No. 95-1283, pt. 1, at 62 (noting that section 101(h)(3) “applies to evidence of crimes which otherwise would have to be minimized because it was not needed to obtain, produce, or disseminate foreign intelligence information”). Given that the FBI is a law enforcement agency as well as a member of the Intelligence Community, the ability to query for evidence of a crime using United States person identifiers can help the FBI pursue important leads regarding criminal activity. Such queries may be important not only to aid foreign intelligence-related criminal investigations (including regarding espionage, state-sponsored cyber attacks, and material support for terrorism), but also in other criminal cases, such as to help locate a kidnapper, monitor human trafficking, or identify distributors of child pornography. *See, e.g.,* 2015 Reauthorization Certifications,

⁵~~(S//NF)~~ As noted above, only the FBI’s section 702 minimization procedures allow for using United States person query terms to identify information that is evidence of a crime. *See, e.g.,* 2015 Reauthorization Certifications, Ex. D at 11.

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Ex. D at 31-32 (allowing the FBI to disseminate child exploitation material, including child pornography, to the National Center for Missing and Exploited Children).

~~(S)~~ Regarding each of these types of queries, the PCLOB found that “rules and oversight mechanisms are in place to prevent U.S. person queries from being abused for reasons other than searching for foreign intelligence or, in the FBI’s case, for evidence of a crime.” PCLOB 702 Report at 131. And since the PCLOB’s 2014 report, additional restrictions regarding the querying and use of information for non-foreign intelligence purposes have been imposed or are included in the FBI’s 2015 minimization procedures. The proposed FBI minimization procedures include a new requirement that (b)(1); (b)(3); (b)(7)(E)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See 2015 Reauthorization Certifications, Ex. D at 12 n.4.

~~(S//OC//NF)~~ The oversight mechanisms referenced by the PCLOB report include the requirement in the NSA, FBI, and CIA minimization procedures that the Department of Justice’s National Security Division (NSD) and the Office of the Director of National Intelligence (ODNI) conduct oversight of each agencies’ United States

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person queries.⁶ This required oversight helps to ensure that each agency is conducting queries designed to “achieve the purpose set out in the [minimization procedures] definition.” H.R. Rep. No. 95-1283, pt. 1, at 56.

(U) Finally, Congress was aware of, and approved, the government’s use of United States person identifiers as selection terms for content queries. In reauthorizing section 702 in 2012, Congress was aware of the ongoing incidental collection of communications of or concerning United States persons under section 702 authority and expressed not only its acceptance of such incidental acquisitions, but also of the use of tailored queries using identifiers of United States persons as selection terms to specifically select those communications. For example, the Senate Select Committee on Intelligence, and then the Senate as a whole, rejected two amendments intended to prohibit the government from querying the contents of communications acquired under section 702 to find communications of particular United States persons. *See* Sen. Rep. No. 112-229 at 10 & 15 (2012); *cf. Grayson v. Wickes Corp.*, 607 F. 2d 1194, 1196 (7th Cir. 1979) (considering the fact that the Senate had “considered and rejected an amendment

⁶ ~~(S//NF)~~ Each set of minimization procedures requires the NSD and ODNI to conduct oversight of each agencies’ queries using United States person identifiers, although the nature of the documentation related to such queries varies in conjunction with the different missions and system capabilities of each agency. *Compare* 2015 Reauthorization Certifications, Ex. B at 7 and Ex. E at 3, *with id.*, Ex. D at 11-12. To facilitate this oversight all agencies are required to keep records of the query terms used to conduct United States person queries of content.

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that would have permitted the parties to a Title VII [of the Civil Rights Act] action to demand a trial by jury” as further evidence that jury trials are not required in such actions). More recently, in passing the USA FREEDOM Act, Congress amended the Act to require the government to publicly report metrics related to its United States person queries, *see* USA FREEDOM Act, Pub. L. 114-23, § 603(b)(2), 129 Stat. 268, 292 (2015), making clear that Congress understands that the government queries section 702-acquired data using United States person identifiers, while also not amending the statute to prohibit such a practice.

~~(TS//SI//NF)~~ Likewise, this Court has previously approved section 702 minimization procedures that permit the government to query section 702-acquired information using United States person identifiers, including as recently as the section 702 certifications submitted and approved last year. *See* 2014 Mem. Op. at 41; 2014 NSA Minimization Procedures at 6-7; 2014 FBI Minimization Procedures at 11; and 2014 CIA Minimization Procedures at 3. In prior dockets, this Court has specifically relied on the longstanding authority under FBI’s standard minimization procedures to query Titles I and III FISA information using United States person identifiers in approving the comparable authority with respect to section 702-acquired information. *See In Re*

DNI/AG 702 Certifications [REDACTED]

[REDACTED], Mem. Op. at 23-24 (FISA Ct. Oct. 3,

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2011) (“2011 Mem. Op.”). Specifically, in an opinion concerning the section 702

Certifications submitted to the FISC in 2011, Judge Bates explained that:

[i]n granting ████████ of applications for electronic surveillance or physical search since 2008, including applications targeting U.S. persons and persons in the United States, the Court has found that the ████████ meet the definitions of minimization procedures. . . . It follows that the substantially-similar querying provision found at Section 3(b)(5) of the amended NSA minimization procedures [for section 702 information] should not be problematic in a collection that is focused on non-United States persons located outside the United States and that, in the aggregate, is less likely to result in the acquisition of nonpublic information regarding non-consenting United States persons.

Id.; see also ████████ Mem. Op. at 23 (noting that although the “targeting of communications pursuant to section 702 is designed in a manner that diminishes the likelihood that U.S. person information will be obtained,” the “protection to U.S. persons afforded by the proposed minimization procedures nearly replicates the protection afforded such persons in cases involving search or surveillance intentionally targeting U.S. persons”).

~~(S)~~ Accordingly, for the reasons explained above, the government submits that the United States person query provisions in the minimization procedures submitted with the 2015 Reauthorization Certifications meet the definitions of minimization procedures in sections 101(h) and 301(4) of the Act.

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B. (U) The Proposed Query Provisions Are Consistent With the Fourth Amendment

~~(S//OC/NF)~~ This Court has found that the NSA's, CIA's, and FBI's current section 702 minimization procedures are consistent with the requirements of the Fourth Amendment. *See* 2014 Mem. Op. at 40. The above-described enhancements to the query provisions proposed by the government provide protections in addition to those that were already found to satisfy the Fourth Amendment. The fact that information is collected under section 702 without a warrant or a finding of probable cause does not undercut the Court's conclusion as to the reasonableness of the program or the permissibility of subsequent United States person queries conducted pursuant to the Court-approved procedures.

~~(S//NF)~~ No warrant or probable cause is required for collection under section 702 because it targets non-United States persons reasonably believed to be located outside the United States, who generally do not have Fourth Amendment rights, for foreign intelligence purposes. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); 2014 Mem. Op. at 39.⁷ For any rights that United States persons may have in communications in the possession of targets of section 702 acquisitions, any

⁷ ~~(S)~~ The Court has also previously concluded that to the extent that the Warrant Clause of the Fourth Amendment might otherwise apply, section 702 acquisitions would fall within the foreign intelligence exception to the warrant requirement. *See* 2014 Mem. Op. at 38 (citing ████████ Mem. Op. at 34-36).

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governmental action implicating those rights must comport with the Fourth Amendment's reasonableness requirement. The Fourth Amendment does not require a "one-size-fits-all" approach to protecting the rights of United States persons before the government can look at or use lawfully acquired information. Instead, the Fourth Amendment requires that the government's actions be viewed in their totality. *See In re Directives Pursuant to Section 105B of the Foreign Intel. Surv. Act*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) (citation omitted) (hereinafter "*In re Directives*"). "This mode of approach takes into account the nature of the government intrusion and how the intrusion is implemented. The more important the government interest, the greater the intrusion that may be constitutionally tolerated." *Id.* (internal citations omitted); *see also Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (describing reasonableness balancing test in which courts "weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy" (internal quotation marks and brackets omitted)).

(U) Nothing in the Fourth Amendment or governing precedent imposes an additional requirement or limitation beyond the reasonableness inquiry. In particular, nothing in the Fourth Amendment requires that queries of lawfully collected information using United States person identifiers must be subject to separate, independent judicial process involving, for example, a warrant or showing of probable cause. In the only district court case to consider Section 702 queries using United States

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person identifiers, the District of Oregon concluded that “subsequent querying of a [section] 702 collection, even if U.S. person identifiers are used, is not a separate search and does not make [section] 702 surveillance unreasonable under the Fourth Amendment.” *United States v. Mohamud*, 2014 WL 2866749, at *24 (D. Or. June 24, 2014).⁸ For example, courts have held in the context of DNA databases that the government’s querying of information that has already lawfully been obtained does not implicate any reasonable expectation of privacy beyond that implicated in the initial collection. *See, e.g., Boroian v. Mueller*, 616 F.3d 60, 67-68 (1st Cir. 2010) (“[T]he government’s retention and matching of [an individual’s] profile against other profiles in [a DNA database] does not violate an expectation of privacy that society is prepared to recognize as reasonable, and thus does not constitute a separate search under the Fourth Amendment.”); *see also Johnson v. Quander*, 440 F.3d 489, 498-99 (D.C. Cir. 2006) (“[A]ccessing the records stored in [a DNA] database is not a ‘search’ for Fourth Amendment purposes. . . . [I]f a snapshot is taken in conformance with the Fourth Amendment, the government’s storage and use of it does not give rise to an independent Fourth Amendment claim.”). That is true even where the queries or uses are not those for which the collection was initially authorized. *See, e.g., King*, 133 S. Ct.

⁸ (U) The District Court did acknowledge that querying using a United States person identifier was “a very close question,” but ultimately held that such queries did not entail “any significant additional intrusion past what must be done to apply minimization procedures.” *Id.*

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at 1980 (upholding warrantless collection of DNA for identification of persons arrested for serious offenses and subsequent use of DNA in investigation and prosecution of unrelated, unsolved crimes); *Jabara v. Webster*, 691 F.2d 272, 279 (6th Cir. 1982) (upholding dissemination by NSA of intelligence collected without a warrant for intelligence purposes to FBI for purposes of criminal investigation).

~~(S//NF)~~ Turning to the reasonableness inquiry, as this Court has recognized, “[t]he government’s national security interest in conducting [section 702] acquisitions ‘is of the highest order of magnitude.’” [REDACTED] Mem. Op. at 37 (quoting *In re Directives*, 551 F.3d at 1012); see also 2014 Mem. Op. at 39; cf. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.” (internal quotation marks omitted)). This vital interest in obtaining timely foreign intelligence information must be balanced against any legitimate privacy interests of United States persons whose communications may be incidentally collected and subsequently queried because they are in contact with non-United States person targets abroad.

(U) In some contexts, the rules the government adopts with respect to review of United States person communications can be relevant to the reasonableness of the collection program under the Fourth Amendment. For example, the Foreign Intelligence Surveillance Court of Review analyzed such rules in concluding that the Protect America Act (PAA), the predecessor to section 702, was constitutionally

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reasonable. See *In re Directives*, 551 F.3d at 1015 (finding it “significant,” in upholding the PAA, that “effective minimization procedures are in place” to “serve as an additional backstop against identification errors as well as a means of reducing the impact of incidental intrusions into the privacy of non-targeted United States persons”).

(U) The government respectfully asserts that the privacy interests implicated by queries using United States person identifiers are properly accounted for by the minimization procedures. As discussed above, consistent with applicable FISC-approved minimization procedures, the government is permitted to review the information it lawfully collects under section 702 – which includes information concerning United States persons – to assess whether the information should be retained or disseminated. Accordingly, United States person information is, by necessity, already subject to review (and use) under the Court-approved minimization procedures. The government respectfully submits that it would be an incongruous result to authorize the communication-by-communication review of lawfully collected information but then to restrict the more focused review of the same information in response to tailored queries designed to return foreign intelligence information or, in the case of the FBI only, evidence of a crime.

~~(S//OC/NF)~~ Moreover, section 702 requires the government to use both targeting and minimization procedures, approved in advance by this Court, to protect the privacy interests of United States persons. As a result of these procedures, United

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States person queries are authorized only for section 702 data that is collected through the use of specific selectors, chosen in conformity with the targeting procedures, and that is acquired through NSA's telephony collection or Internet communications acquired by or with the assistance of the FBI from (b)(1); (b)(3); (b)(7)(E).⁹ The NSA and FBI targeting procedures are reasonably designed to ensure that only non-United States persons reasonably believed to be located overseas are targeted, and only when there are reasonable grounds to believe that those persons possess or are likely to possess, receive or communicate foreign intelligence within the scope of the approved certifications. 50 U.S.C. § 1881a(b), (d)(1) & (f)(1)(A). *See also* [REDACTED] Mem. Op. at 39 n.47 ("It is fairly obvious why communications to and from targets identified under these [targeting] procedures would be expected to contain foreign intelligence information."). Such targeting procedures "direct the government's acquisitions toward communications that are likely to yield the foreign intelligence information sought, and thereby afford a degree of particularity that is reasonable under the Fourth Amendment." *Id.* at 39-40.

~~(S//OC/NF)~~ In addition to the targeting procedures, the ability to query using United States person identifiers for foreign intelligence information or evidence of a

⁹~~(S//NF)~~ As stated above, United States person identifiers may not be used as query terms for communications collected under NSA's upstream Internet collection techniques. *See* 2015 Reauthorization Certifications, Ex. B at 7.

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crime must be viewed in the context of the many other protections found within the minimization procedures. These restrictions limit both who has the ability to query any data and what may be done with the results of any queries. For example, the proposed CIA minimization procedures require that CIA personnel “specifically agree to: comply with these [section 702] minimization procedures; comply with all CIA direction on the handling of information acquired under section 702; and not make any use of, share, or otherwise disseminate any information acquired pursuant to section 702 without specific CIA approval.” *See* 2015 Reauthorization Certifications, Ex. E at 1. Likewise, the proposed NSA and FBI section 702 minimization procedures contain similar restrictions on the personnel who may access section 702-acquired information. *See, e.g.*, 2015 Reauthorization Certifications, Ex. B at 1, 4 & Ex. D at 6-8. Moreover, the proposed NSA, FBI, and CIA procedures permit dissemination of non-publicly available and personally identifying information concerning United States persons only under prescribed circumstances, to include when the information constitutes foreign intelligence information or is necessary to understand foreign intelligence information. *Id.* Ex. B at 14-15; Ex. D at 30-31; Ex. E at 4. In other words, the proposed procedures by design aim to ensure that any intrusion on any privacy interests of United States persons is reasonably balanced against the government’s foreign intelligence needs.

~~(S//OC/NF)~~ In light of the limitations imposed by the section 702 targeting and minimization procedures, the government’s authority to query section 702-acquired

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information using United States person identifiers raises no additional Fourth Amendment issue. Indeed, this Court has repeatedly found that the section 702 targeting and minimization procedures satisfy any Fourth Amendment concerns resulting from the incidental collection of United States person communications. *See, e.g.,* 2014 Mem. Op. at 39-40. This programmatic judicial review, in the context of targeting non-United States persons overseas for foreign intelligence purposes, is itself an important factor in assessing the reasonableness of the statutory scheme and its implementation for Fourth Amendment purposes, including the use of United States person queries. *See In re Directives*, 551 F.3d at 1012-13 (noting that prior judicial approval, though not indispensable, is among the factors relevant to assessing Fourth Amendment reasonableness). Although the proposed procedures submitted with the 2015 Reauthorization Certifications amend those provisions of the NSA, FBI, and CIA minimization procedures regarding United States person queries of section 702 information, they do not expand the agencies' ability to conduct such queries, but instead incorporate existing practices into the proposed procedures. *See* 2015 Reauthorization Certifications Cover Filing at 7-10, 20-21. By incorporating these practices into the procedures, the procedures are more, not less, protective of privacy.

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II. (U//FOUO) The Provisions of the Proposed Minimization Procedures Regarding the Preservation of Information For Litigation Purposes Otherwise Subject to Destruction Requirements Are Consistent With the Act and the Fourth Amendment

~~(S//OC/NF)~~ The current FBI, NSA, and CIA section 702 minimization procedures permit the retention of information for litigation-related reasons when that information would otherwise be subject to destruction under other provisions of the applicable minimization procedures. Specifically, the current FBI minimization procedures permit the FBI to retain information otherwise subject to destruction under its retention schedule if “the FBI and NSD determine that such information is reasonably believed to be necessary for, or potentially discoverable in, administrative, civil, or criminal litigation.” 2014 FBI Minimization Procedures at 21-22. The current NSA and CIA minimization procedures also contain provisions that allow those agencies to retain information for litigation purposes if advised by the Department of Justice, notwithstanding certain destruction requirements that might otherwise apply. *See* 2014 NSA Minimization Procedures at 8; 2014 CIA Minimization Procedures at 9.

A. (U) Summary of Procedural Changes

~~(S//OC/NF)~~ In its 2014 Memorandum Opinion, this Court approved the litigation-related provisions in the 2014 NSA, FBI, and CIA minimization procedures. *See* 2014 Mem. Op. at 41. Additionally, the Court suggested that these provisions in the NSA and CIA minimization procedures be further expanded to account for

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circumstances where section 702-acquired information is subject to a destruction requirement other than age-off and may need to be preserved to satisfy the government's preservation obligations without requiring the government to seek relief from the minimization procedures from this Court. *See* 2014 Mem. Op. at 23-24. Specifically, the Court found that "preservation of particular information as long as there is a litigation need for that information, subject to strict controls on access – strikes a proper balance between the protection of United States person information, on the one hand, and the litigation obligations of the government and fairness to other parties to that litigation, on the other." *Id.* at 23. Moreover, the Court encouraged the government, in the interests of "efficiency and consistency . . . to consider further revision of these procedures to address such situations with generally applicable rules, rather than on a piecemeal basis." *Id.* at 24.¹⁰

~~(TS//SI//NF)~~ In the proposed NSA and CIA minimization procedures submitted to the Court with the 2015 Reauthorization Certifications, the government has made changes to provisions of those procedures consistent with the Court's interest in more "generally applicable rules." The government has modified the language in the proposed NSA and CIA minimization procedures to permit the retention of specific

¹⁰ ~~(TS//SI//NF)~~ The Court expressed a similar sentiment during oral arguments regarding the 2014 section 702 reauthorization certifications. *See In Re DNI/AG 702 Certifications* [REDACTED], [REDACTED], Hearing Transcript at 12 (FISA Ct. Aug. 4, 2014).

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section 702-acquired information otherwise subject to age-off or certain other destruction requirements if the Department of Justice advises the relevant agency in writing that such information is subject to a preservation obligation in pending or anticipated administrative, civil, or criminal litigation. See 2015 Reauthorization Certifications, Ex. B at 8-9, Ex. E at 10-11. Importantly, information retained for such litigation-related purposes may not be used for analytical purposes: (b)(1); (b)(3); (b)(7)(E)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 2015 Reauthorization Certifications, Ex. B at 8; see also 2015 Reauthorization Certifications, Ex. D at 24-25, Ex. E at 10-11.

Moreover, by only allowing the NSA, FBI, and CIA to preserve specific information otherwise subject to destruction under the minimization procedures upon a written finding by the Department of Justice that the information needs to be preserved, the government ensures that these materials are only being preserved when “there is a litigation need for that information.” 2014 Mem. Op. at 23.

~~(S//NF)~~ Although the proposed procedures allow the NSA and CIA at the direction of the Department of Justice to retain information subject to a broader range of destruction requirements to satisfy the government’s preservation obligations, those agencies’ procedures do not allow the NSA and CIA to retain, without the Court’s

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permission, information that may be subject to destruction requirements that are not specified in the minimization procedures (for instance, as applicable to unauthorized collection, such as the unintentional tasking of a selector to section 702 acquisition caused by a typographical error in the targeting process).¹¹ See 2015 Reauthorization Certifications, Ex. B at 8-9, Ex. E at 10-11. When information is subject to a destruction requirement other than those contained in the minimization procedures the relevant provisions in the NSA's and CIA's proposed minimization procedures specify when and how the Department of Justice will notify and request authorization from this Court to continue to retain section 702-acquired information as appropriate and consistent with law. *Id.* NSA, FBI, and CIA must promptly destroy the information, as required, after the Department of Justice notifies the agencies in writing that retention is no longer necessary for litigation-related purposes. See 2015 Reauthorization Certifications, Ex. B at 8-9; Ex. D at 25; Ex. E at 10-11.

¹¹~~(S)~~ Although not all communications that might be acquired from such targeting are explicitly addressed in NSA's or CIA's *minimization* procedures, NSA's *targeting* procedures require that any information collected from the intentional targeting of a United States person or person not reasonably believed to be located outside the United States at the time of targeting must be purged from NSA databases. See 2015 Reauthorization Certifications, Ex. A at 9. Moreover, the government purges any collection from such targeting from government analytic databases in order to prevent the use of such information in non-conformance with 50 U.S.C. § 1809.

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~~(TS//SI//NF)~~ In its 2014 Memorandum Opinion, the Court also ordered the government to submit an annual report identifying matters in which the agencies were retaining information otherwise subject to the age-off requirement specified in the NSA, FBI, and CIA minimization procedures. 2014 Mem. Op. at 42. Under the proposed minimization procedures currently subject to review by the Court, NSA and CIA are obligated to annually provide NSD a summary of all litigation matters requiring preservation of section 702-acquired information that would otherwise be subject to destruction, a description of the section 702-acquired information being preserved for each such litigation matter, and if possible, the status of each such litigation matter. *See* 2015 Reauthorization Certifications, Ex. B at 8-9, Ex. E at 10-11.¹²

B. (U) Legal Analysis

~~(S//NF)~~ The current and proposed provisions allowing for the retention of section 702-acquired information for litigation purposes are intended to prevent prejudice to civil litigants and to protect the rights of criminal defendants while continuing to satisfy the government's obligations under the Fourth Amendment as well as limiting the retention of and access to non-publicly available United States person data as required by FISA.

¹² ~~(S)~~ The FBI also provides similar information to NSD.

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(U) The duty to preserve information in non-criminal litigation generally arises from the common-law duty to take reasonable steps to avoid spoliation of relevant evidence for use at trial; the inherent powers of the courts; and court rules governing the imposition of sanctions. *See, e.g., Silvestri v. Gen. Motors*, 271 F.3d 583, 590-91 (4th Cir. 2001); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 176-77 (S.D.N.Y. 2004). Depending on the facts of each case, once the duty to preserve takes effect, the preserving party may be required to suspend existing policies related to deleting or destroying files and preserve relevant documents related to the litigation. The government recognizes that the common law obligation to preserve information for non-criminal matters in most cases cannot take precedence over the government's obligations to comply with the Fourth Amendment or FISA statutory requirements.¹³

¹³ ~~(S)~~ As this Court has recognized in a different context, the need to balance the requirements of FISA minimization procedures with the needs of civil litigants is very fact specific. For example, such requirements applicable to information entitled to minimal privacy protections can be outweighed by the needs of a litigant challenging the lawfulness of that collection. On March 7, 2014, the Court issued an order denying, without prejudice, a government motion to amend the Primary Order issued in docket number BR14-01 which sought to authorize the preservation and/or storage of bulk call detail records or "telephony metadata" beyond five years after its initial collection in order to satisfy the government's common law obligations to preserve potentially relevant evidence for civil litigation-related purposes. *In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Docket No. BR14-01 (FISA Ct. Mar. 7, 2014). Among other things, the Court found that in the absence of any documented interest on the part of the civil plaintiffs to preserve information, or a court order compelling it, the government's general common law obligation to preserve potentially relevant evidence did not in that matter supersede its obligation to destroy the voluminous non-targeted set of records at issue under the applicable provisions of FISC orders. *Id.* Following

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See In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things, Docket No. BR14-01, Mem. Op. at 3-4 (FISA Ct. Mar. 7, 2014) (concluding that because the obligation to preserve relevant records in civil litigation “is a matter of federal common law . . . it may be displaced by statute whenever Congress speaks directly to the issue,” referencing retention restrictions statutorily derived from 50 U.S.C. § 1861(c), (g)); 50 U.S.C. § 1881a(b), (e)). The proposed minimization procedures reflect the need for a fact-specific balancing of these constitutional and FISA statutory requirements on one side with a party’s common law and rule-based interests on the other by only allowing the agencies to preserve data at the direction of the Department of Justice upon a finding that there is a preservation obligation.

(U) Unlike in civil matters, certain preservation and discovery obligations in criminal matters are constitutional requirements that in some cases may require the government to balance the Fifth Amendment due process rights of one defendant

the issuance of a preservation order, the Court subsequently issued an order granting the government’s motion for temporary relief from the Primary Order’s destruction requirement. *See In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Docket No. BR14-01 (FISA Ct. Mar. 12, 2014). As noted above, these decisions were made in a different context, and the government submits that these opinions in docket number BR14-01 are distinguishable from the issue currently before the Court, which involves the preservation of specific targeted acquisitions under section 702, as opposed to the voluminous, non-targeted production of call detail records at issue in the NSA Section 215 bulk telephony metadata program.

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against the possible Fourth Amendment privacy rights of another individual. For example, the government is obligated by constitutional and statutory requirements to ensure that criminal defendants are provided with a fair trial and that exculpatory material and impeachment evidence are disclosed, where required.¹⁴ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”); see also *Giglio v. United States*, 405 U.S. 150 (1972) (extending *Brady* principles to evidence affecting the credibility of government witnesses); 18 U.S.C. § 3500 (Jencks Act) (requiring the government to produce statements of government witnesses to the defense after a witness has testified at trial). The preservation provisions of the proposed FBI, NSA, and CIA section 702 minimization procedures, which reflect each agencies’ unique mission, would allow the government to strike the appropriate balance of what may be competing constitutional rights and statutory

¹⁴ ~~(S//NF)~~ As noted above, the NSA and CIA practices for helping prosecutors satisfy these constitutional and statutory obligations in criminal matters are different than the FBI’s, in part because NSA and CIA are not law enforcement agencies.

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requirements by only allowing the agencies to preserve data at the specific instruction of the Department of Justice.¹⁵

~~(S//NF)~~ In contexts concerning the FBI's retention of non-section 702 FISA-acquired information, this Court has previously recognized the government's need to retain such information for litigation purposes. In an order dated ^{(b)(1); (b)(3); (b)(7)(E)} [REDACTED]

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[REDACTED]

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¹⁵ (U//FOUO) This is not to suggest that the United States Intelligence Community (USIC), whose mission includes the performance of intelligence activities necessary for the conduct of foreign relations and the protection of national security, is subject to the same criminal discovery obligations as a law enforcement agency; rather, it recognizes that the Department of Justice may determine that in certain, limited circumstances, information in the USIC's possession may trigger the government's obligations to preserve information related to a criminal prosecution.

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(b)(1); (b)(3); (b)(7)(E)
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[Redacted] *See In Re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act, Docket Nos. Multiple Dockets, including Docket No. (b)(1); (b)(3); (b)(7)(E) (FISA Ct. Aug. 11, 2014).*

~~(S//NF)~~ Any retention of information to satisfy preservation obligations for litigation purposes must also, however, comply with and be balanced by the statutory requirements regarding nonpublicly available United States person information. As discussed above, 50 U.S.C. § 1881a(g)(2)(A)(ii) requires that a section 702 certification contain minimization procedures that meet the definition of minimization procedures under Title I or Title III of the Act (i.e., 50 U.S.C. §§ 1801(h) and 1821(4)). The proposed NSA, FBI, and CIA section 702 minimization procedures have been carefully crafted to balance the competing concerns of not retaining data longer than permitted by the minimization procedures and allow each agency to comply with any preservation obligations it may have. Specifically, these minimization procedures require

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consultation between the relevant agency and the Department of Justice regarding the initiation (and subsequent removal) of any litigation hold. The proposed changes to the NSA and CIA minimization procedures also require ongoing consulting with and reporting to the Department of Justice regarding all administrative, civil, or criminal litigation matters necessitating preservation of section 702-acquired information otherwise subject to destruction, a description of the information retained for each such litigation matter, and, if possible, the current status of the matter. *See* 2015 Reauthorization Certifications, Ex. B at 8-9, Ex. E at 10-11.

~~(S//NF)~~ Moreover, the FBI, NSA, and CIA minimization procedures strictly limit access to information retained for litigation-related purposes to personnel working on the particular litigation matter, except on a case-by-case basis after consultation with the Department of Justice. *Id.*; 2015 Reauthorization Certifications, Ex. D at 24-25. Although the information has not been destroyed, there is nothing in the Act that requires destruction as the sole means to minimize retention of data. Indeed, Congress recognized that placing restrictions on access to data -- rather than destroying it -- may be sufficient to meet the minimization procedures definition. H.R. Rep. No. 95-1283, pt. 1, at 56 (1978) (noting that minimizing retention of data should be done by "destruction *where feasible*," but that it could also entail "other measures designed to limit retention," including "provisions with respect to ... what may be retrieved and

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on what basis”) (emphasis added); *see also* 2011 Mem. Op. at 78-79 (suggesting that the adoption of “more stringent post-acquisition safeguards” may satisfy the reasonableness requirement of the Fourth Amendment). The above-described access restrictions are consistent with Congress’ original understanding of how the government may need to minimize retention of data in circumstances where the destruction of that data is not feasible.

(U) **Conclusion**

~~(S//OC/NF)~~ For the foregoing reasons, the government respectfully requests that the Court approve the submitted 2015 Reauthorization Certifications, including the accompanying targeting and minimization procedures, in their entirety. Specifically, the government submits that the two aspects of the FBI, NSA, and CIA proposed section 702 minimization procedures discussed herein -- queries designed to return information concerning United States persons and the preservation for litigation purposes of information otherwise required to be destroyed -- are consistent with both the Act and the Fourth Amendment. Accordingly, the government respectfully requests that this Court enter orders pursuant to subsection 702(i)(3)(A) of the Act approving: DNI/AG 702(g) Certifications [REDACTED] the use of the targeting and minimization procedures attached thereto as Exhibits A, B, C, D, E, and G in connection with acquisitions of foreign intelligence information in accordance with those certifications; and the use of the minimization procedures attached as Exhibits B,

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D, and E to DNI/AG Certifications [redacted] in connection with
foreign intelligence information acquired in accordance with DNI/AG 702(g)
Certifications [redacted]

[redacted]

Respectfully submitted,

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